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ABSTRACT

Supreme Court interpretations of the First Amendment have allowed congressional regulation of broadcasting. This report discusses governmental regulation of the mass communication media, especially in the area where restrictions are most numerous--television. Specifically, the following topics are examined: Supreme Court litigation regarding broadcasting, early regulation of broadcasting by federal agencies, the role of the executive branch in policy formation, the establishment of the Office of Telecommunications Policy (OTP), actions taken by Clay T. Whitehead (the first director of the OTP), OTP legislation before Congress, and the demise of a bill which would have necessitated a strict review process for broadcasting-license renewal. Although movement has been made to abolish the OTP, it is hoped that, under a new administration, and with a permanent director, the organization can smooth its relations with Congress and become effective in telecommunications policy formulation for the private sector. (KS)

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FREEDOM OF INFORMATION CENTER REPORT NO. 368

GOV'T REGULATION OF BROADCASTING

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Editor's Note:

The Office of Telecommunications Policy, now headed by acting director William Thaler, is being re-examined (Washington Star, 2-17-77) by President Jimmy Carter as part of a broader reorganization within the executive branch. The White House is considering several plans to restructure OTP. Although no decisions have been made, one possibility is eliminating OTP and delegating its functions among various existing agencies and departments. Opposition to such a proposal is strong among congressmen who do not want OTP abolished or its power reduced. And Congress will have a say in the future of OTP because of its power to veto Carter's plans. A determination of whether or not OTP will remain an independent agency responsible for advising the President on telecommunications matters is crucial because of a number of communications issues that must be dealt with soon, among them substantial revision of the Communications Act of 1934.

Introduction

The First Amendment to the United States Constitution provides, in part, that Congress shall make no law abridging freedom of speech or the press. The importance of these freedoms to our scheme of government hardly needs to be emphasized. Supreme Court Justice Benjamin Cardozo said that freedom of thought and speech "is the matrix, the indispensable condition, of nearly every other form of freedom."[1] And the English jurist Sir William Blackstone said "liberty of the press is indeed essential to the nature of a free state. . . ."[2]

But these freedoms, while essential to a free state, are nevertheless not without limits. Freedom of the press is limited by laws prohibiting the publishing of obscene or libelous material. Even Blackstone admitted that a person "must take the consequences" if he "publishes what is improper, mischievous or illegal. . . . ."[3] Freedom of speech is also limited; a person cannot say whatever he wants whenever he wants. Justice Oliver Wendell Holmes said: "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."[4] Justice Edward Sanford agreed: "It is a fundamental principle, long established, that the freedom of speech and of the press which is secured by the Constitution, does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom."[5]

So even though the First Amendment prohibits Congress from passing laws abridging or limiting freedom of speech or the press, governmental limitations can be, and are, placed upon those who speak or publish. The question confronting us is: How far can government limitations extend before the freedoms of speech and press are severely curtailed, perhaps rendered meaningless?

This paper discusses how government limits freedom of the press. Specifically, it is about the mass communication medium where governmental regulations are most numerous—television.

The first section of the paper shows why Congress, in spite of the specific prohibition of the First Amendment, is permitted to regulate television. It examines Supreme Court rulings that state electronic journalism is a medium "affected" by a First Amendment interest, but not immune from strict governmental regulation.

The second section deals with federal agencies directly involved in regulating broadcasting. It examines the development of the Federal Communications Commission (FCC) following passage of the Radio Act of 1927, itself an outgrowth of the Radio Act of 1912. It also examines how, for many years, governmental regulations centered only on the technical or engineering aspects of the broadcasting industry. Not until 1948, long after federal agencies regulating broadcasting were created and the fairness doctrine and license renewal requirements were established, was the Supreme Court asked to interpret whether broadcasting was indeed a form of "press" as used in the First Amendment, and therefore not subject to substantive regulation.

Until the early 1950's, the President had no effective voice in communications matters. Communications policy formulation belonged solely to the FCC, a congressionally

Summary:

Supreme Court interpretations of the First Amendment have allowed congressional regulation of broadcasting. The author traces broadcast regulation from these Supreme Court decisions, examining the federal agencies that have been involved in regulation and the part played by the executive branch in telecommunications policy formulation.

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established independent regulatory agency. The third section of this paper considers the gradual change that took place after 1950. It examines the Office of Telecommunications Policy (OTP), established in 1970 as the President's principal advisor on communications matters. (Telecommunications includes all forms of communications—satellite, cable, television, radio, to name only a few.) It also looks at agencies created prior to the establishment of the OTP that helped coordinate communications efforts in the executive branch. The major emphasis of this section is on an attempt by the OTP to change, through legislation, the FCC's license renewal process, as well as the fairness doctrine. The OTP attempted to enter the area of broadcast regulation and failed.

Supreme Court Sets the Stage

Chief Justice of the United States Supreme Court Warren Burger was asked in an interview with the United States Information Agency (USIA) whether he thought freedom of the "press," as the word is used in the First Amendment, applied uniformly to the broadcasting media and the print media.[6] The Chief Justice said it did not. He said that since broadcasting requires the use of airwaves, which are "part of the public domain, public property," it is subject to a form of regulation that "would be found unacceptable with respect to the print media." Burger cited the fairness doctrine as an example of the difference in treatment given broadcasters and persons in the print media.

But Burger said that regulation of the broadcasting industry does not extend to content "in any specific detail." Although the possibility for abuse exists in a system in which broadcasting is licensed by the government, Burger said the courts provide a defense against such abuse.

Burger's comments echo two Supreme Court decisions he authored concerning governmental regulation of the press. In *Miami Herald Publishing Co. v. Tornillo* he ruled that access through a right of reply statute is not permissible in newspapers.[7] In *Columbia Broadcasting System v. Democratic National Committee* Burger said that access through the fairness doctrine is a proper means of assuring that both sides of controversial issues will be presented over broadcast facilities.[8]

In *Tornillo,* a Miami, Florida newspaper had published articles critical of a candidate for state office. A statute passed by the Florida legislature requires that a political candidate be given a chance to reply to newspaper articles about him. Under this "right of reply" statute, the candidate requested an opportunity to respond, but the newspaper refused. The case was ultimately appealed to the Supreme Court. Chief Justice Burger said in his opinion:

> The choice of material to go into a newspaper, and the decisions made as to limitations on the size of the paper, and content, and treatment of public issues and public officials—whether fair or unfair—constitutes the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.[9]

But in relation to governmental regulation of television (as Burger noted in his interview with the USIA), the Supreme Court has felt otherwise. Before examining Burger's decision in the *CBS* case, it is necessary to go back to the first case in which the Supreme Court dealt with First Amendment use of the word "press," and its relationship to other forms of communication. A 1948 opinion written by Justice William O. Douglas in *United States v. Paramount Pictures* said: "We have no doubt that moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment."[10] While the Court was specifically addressing a question involving the motion picture industry, it is clear from the opinion that the word "press" was interpreted as including broadcasting (at that time only radio).

Again writing for the Court in 1954, Justice Douglas said in *Superior Films v. Department of Education of Ohio*: ". . . the First Amendment draws no distinction between the various methods of communicating ideas."[11]

A third case involving this issue, *Farmers Educational and Cooperative Union of America v. WDAY, Inc.*, was decided in 1959. In an opinion written by Justice Hugo Black, the Court said: "Thus, expressly applying the country's tradition of free expression to the field of radio broadcasting, Congress has from the first emphatically forbidden the [Federal Communications] Commission to exercise any power of censorship over radio communications."[12]

During the next 10 years, through changes in the Court's membership, the growth of television (especially news programming), and the evolution of the FCC's fairness doctrine and license renewal process, the Supreme Court came to rule that broadcasting was *not* entirely included within the meaning of the word "press" as used in the First Amendment. The central question that confronted the Court was whether the fairness doctrine could stand, in light of its earlier decision. If broadcasting *was* included within the meaning of the word "press," then the fairness doctrine could not stand. If, however, broadcasting was *not* included within the meaning of the word "press," then the fairness doctrine could stand. The Supreme Court ruled in favor of the FCC, upholding the fairness doctrine.

The first of two cases involving this ruling came in 1969. In *Red Lion Broadcasting Co. v. Federal Communications Commission,* the Court said in an opinion written by Justice Byron White: "Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish."[13] White went on to say: "Although broadcasting is clearly a medium affected by a First Amendment interest, differences in the characteristics of news media justify differences in the First Amendment standards applied to them."[14] This opinion differs from Justice Douglas' opinion that the First Amendment draws no distinction between the various methods of communicating ideas.

The second case, *Columbia Broadcasting System v. Democratic National Committee*, was heard in 1973. This was the second Supreme Court decision concerning government regulation of the press authored by Chief Justice Burger. A national organization opposed to American involvement in Vietnam filed a complaint with the FCC,

charging that a radio station had refused to sell time to the organization so it could express its views on the war. The Democratic National Committee (DNC) requested the FCC to rule that broadcasters may not refuse to sell time to organizations who wish to comment on public issues. The FCC rejected the DNC's request and the case was ultimately appealed to the Supreme Court. Speaking for the Court, Chief Justice Burger said: "It was reasonable for Congress to conclude that the public interest in being informed requires periodic accountability on the part of those who are entrusted with the use of broadcast facilities, scarce as they are."[15] Burger felt that the right of paid access, on a first-come-first-served basis, would favor the wealthy. This reason, among others, persuaded the Chief Justice to rule that the fairness doctrine was a proper instrument for handling access to television or radio.

Justice Douglas, who wrote two of the opinions contrary to *Red Lion* and *CBS v. DNC,* did not participate in the Red Lion decision. However, he did participate in the CBS case and filed a dissent which said:

> I did not participate in [Red Lion and] would not support it. The Fairness Doctrine has no place in our First Amendment regime. It puts the head of the camel inside the tent and enables administration after administration to toy with TV or radio in order to serve its sordid or benevolent ends. . . . That may argue for a redefinition of the responsibilities of the press in First Amendment terms. But I do not think it gives us carte blanche to design systems of supervision and control nor empower Congress . . . acting directly or through any of its agencies such as the FCC [to] make "some" laws "abridging" freedom of the press. . . . [In my opinion] TV and radio, as well as the more conventional methods for disseminating news, are all included in the concept of "press" as used in the First Amendment. . . .[16]

Thus, while the Supreme Court at one time interpreted the word "press" as used in the First Amendment to include broadcasting, in recent years the Court has said that broadcasting is a medium only "affected" by a First Amendment interest. Under such an interpretation, governmental regulation such as the fairness doctrine is permissible.[17]

But long before these Supreme Court decisions, government agencies were already regulating broadcasting. The second section of this paper examines why and how these agencies were created and their role in regulating broadcasting.

Early Regulation by Federal Agencies

From almost its beginning, broadcasting has been regulated by the federal government. The Radio Act of 1912, the first comprehensive piece of broadcasting legislation enacted by Congress, made it illegal to operate a transmitting station without first securing a license from the Secretary of Commerce. But the only requirement for obtaining a transmitting license was "application therefor" by any interested party. Walter B. Emery said in his book *Broadcasting and Government* that the Secretary "had no authority to specify particular frequencies, power, hours of operation or the period of a license."[18] And Sydney Head said in *Broadcasting In America* that "all who wanted to and had a good reason to could be allowed to operate radio stations."[19]

This legislation meant little real control over broadcasting, for there were far too many persons who applied for, and were granted, a license. According to a House report on a bill to amend the 1912 Act:

> On December 27, 1922, there were in operation in the country 21,065 transmitting radio stations. Of these 16,898 were amateur stations, 2,762 were ship stations, 569 were broadcasting stations, 39 were coast stations, 12 were transoceanic stations, and there were a few others not necessary to be enumerated.[20]

This rapid growth of broadcasting stations prompted Congressman Wallace H. White of Maine, author of the above House report, to say:

> There must be an ordered system of communication in the air into which all users of the ether must be fitted or there can be no intelligible transmission by this means. . . . A schedule for transmission of messages in the air is as essential as a schedule for the movement of trains upon land.[21]

However, the House and Senate could not agree on new legislation in 1923 and the transmitting situation grew worse. Although Secretary of Commerce Herbert Hoover attempted to withhold the granting of licenses from some applicants, a federal court ruled that the 1912 Act required him to issue the licenses. In *Hoover v. Intercity Radio Company,* the District Court ruled that

> the duty of issuing licenses to persons or corporations coming within the classification designated in the act reposes no discretion whatever in the Secretary of Commerce. The duty is mandatory; hence the courts will not hesitate to require its performance.[22]

Defeated at court, Secretary Hoover did take one step to ease the situation. The Commerce Department placed all broadcasting stations in a band from 550 to 1350 kilocycles and assigned other frequencies for amateur, government, and marine use.[23]

Sydney Head says that "Secretary of Commerce Hoover, an ardent believer in free enterprise, had hoped that the [broadcasting] industry would be able to discipline itself without government regulation."[24] But many broadcasters hoped that the federal government would step in and help coordinate transmission frequencies. And, according to Emery, Hoover "became convinced . . . that the serious impediments to effective broadcasting . . . could not be removed until the government was given actual and not nominal authority to regulate the . . . industry."[25] Therefore, from 1922 to 1925, Secretary Hoover called four national radio conferences to discuss solutions to the overcrowded spectrum problem. These conferences set the stage for passage of the badly needed regulatory act.

President Calvin Coolidge was also instrumental in getting new regulatory legislation passed. In a 1926 message to Congress, President Coolidge said that, due to federal court decisions and attorney general opinions, the

authority of the Secretary of Commerce to effectively regulate the broadcasting industry had been severely curtailed.[26] He recommended that appropriate remedial legislation be passed; the resulting legislation was the Radio Act of 1927.

The passage of the Radio Act of 1927 not only resolved the crowded spectrum problem, but also established guidelines to permit the government to withhold the granting of a transmitting license.[27] And it established a requirement that the public interest, convenience, or necessity be shown before a license is granted or renewed. The act began not only technical, but also substantive, regulation of broadcasting. It is usually considered the basis of current broadcast regulation.

Up until passage of the Radio Act of 1927, all authority for regulating the broadcasting industry rested in the Secretary of Commerce. This put broadcasting regulatory authority in the executive branch. But passage of the act greatly reduced the authority and role of the executive branch in formulating communications policy. That authority now rested in a new, independent regulatory agency —the Federal Radio Commission (FRC).

The Radio Act of 1927 established that:

1. a commission of five members, to be called the Federal Radio Commission, would be created with the authority to grant, renew or revoke station licenses;
2. the broadcasting spectrum belonged to the public and a broadcaster acquired no ownership rights when he was granted a license;
3. a person or corporation would be granted a license if they could show that the public interest, convenience or necessity would be served;
4. the federal government, not private industry, would set rules for the technical operation of broadcasting stations;
5. a right of appeal to a federal court would be permitted on decisions and rulings made by the FRC; and
6. free speech applied to broadcasters.[28]

What the act did *not* say is as important as what it *did* say. Section 29 provided that the FRC would not have the power of censorship over radio communications nor would it interfere with the right of free speech by means of radio communications. However, the section did not specifically state that the FRC should not interfere with the broadcasters' right to broadcast or transmit information. The applicability of freedom of the press to broadcasting was not mentioned.

Section 21 provided that the FRC "may grant such [radio construction] permit if public convenience, interest, or necessity will be served by the construction of the station."[29] However, the act did not specify criteria to be used in determining whether a station had fulfilled the public interest.

The 1927 Act operated more or less successfully for the next six years. But on February 26, 1934, President Franklin Roosevelt recommended that Congress restructure the FRC and "create a new agency to be known as the Federal Communications Commission. . . .", because, "there is today no single Government agency charged with broad authority [over communications matters]."[30] The President's recommendation was based on a study by a government committee appointed by the Secretary of Commerce. The committee found that the FRC regulated radio broadcasting, the Interstate Commerce Commission (ICC) regulated interstate telephone and telegraph carriers, the Postmaster General had control over wire services, and the Secretary of Commerce was involved in miscellaneous communications matters.[31] Accepting the President's recommendations, Congress passed the Communications Act of 1934.

The 1934 Act incorporated the major provisions of the 1927 Act. However, instead of a federal radio agency there was now a Federal Communications Commission (FCC). The FCC had the same duties as the FRC and more. The FCC was authorized to grant or renew a license if it should find the public convenience, interest, or necessity would be served. It established strict guidelines as to how this requirement could be met. These guidelines set the number of hours of religious programming, news programming, public service programming, etc., that a broadcaster must air. (These types of programs are considered to serve the public convenience, interest, or necessity.) This is one area in which the FCC has gone beyond technical regulation of broadcasting.

Another area where the FCC has gone beyond regulation of the technical or engineering aspects of broadcasting is the fairness doctrine. While not a specific part of the Communcations Act of 1934, the fairness doctrine involves a detailed set of FCC rules, as well as federal court decisions, insuring that broadcasters present fairly both sides of controversial issues of public importance.[32]

Executive Branch and Policy Formation

The 1927 Act had reduced the role of the executive branch in communications policy formulation, and the 1934 Act all but eliminated it. The President did have the power to appoint members of the FCC, but the advice and consent of the Senate was required. And no more than four members of the seven-member commission could be members of the President's political party.

Presidents could, and often did, propose legislation affecting broadcasting. But there was no central agency in the executive branch responsible for formulating communications policy for the President.

Section 305 of the 1934 Act authorized the President to assign all radio frequencies to be used by the federal government. In 1951, President Harry Truman delegated to the FCC (subject to certain specific limitations) the authority vested in him with respect to transmitting stations other than those owned and operated by the federal government.[33] Federal transmitting stations were placed under the control of the heads of the departments with which the stations were concerned.

Beginning with President Truman in 1951, the chief executive sought to gain a more effective voice in communications policy matters. President Truman created the position of telecommunications advisor in the executive office, the first position established within the executive branch that dealt specifically with helping the President on telecommunciations matters.[34] The advisor was appointed by the President to assist him:

1. in the formulation of telecommunications policies and the coordination of planning for pro-

grams designed to assure the greatest possible national advantage for the United States' telecommunications efforts;
2. in assigning radio frequencies to Government agencies under the provisions of section 305 of the Communications Act . . .[35]

The position of telecommunications advisor lasted nearly three years; his duties were transferred to the Office of Defense Mobilization (ODM) in 1953. In addition to these duties, the ODM was responsible for:

1. coordinating the development of telecommunications policies and standards;
2. assuring high standards of telecommunications management;
3. coordinating the development by Government agencies of telecommunications plans and programs designed to assure maximum security to the United States in a time of national emergency with a minimum interference to continuing nongovernmental requirements;
4. assigning radio frequencies to Government; and
5. developing Government frequency requirements.[36]

The functions of the ODM were relinquished to the Office of Civil and Defense Mobilization in 1958. This office combined the Federal Civil Defense Administration with the Office of Defense Mobilization.

In 1962, President John Kennedy directed that an assistant director of another federal agency, the Office of Emergency Planning, become the Director of Telecommunications Management. The duties of the director were essentially the same as those of the Office of Civil and Defense Mobilization, abolished by this executive order. The position of director of telecommunications remained in effect until 1970, when it was abolished by Reorganization Plan No. 1.

In 1970 the Secretary of Commerce also returned to the communications scene, when he created an Office of Telecommunications. According to the 1974-75 *United States Government Organization Manual,* a "major objective of the Office is to help reduce uncertainty with regard to the development of new, high-technology telecommunications systems and services, either by government or by the private sector."[37] The office does not enter the area of telecommunications policy formulation for the President. Its main function is to help standardize, among the various private communications companies and the federal government, technological innovations affecting the telecommunications industry.

Several other events also lead to the establishment of the Office of Telecommunications Policy in 1970. In a 1967 message to Congress concerning communications President Lyndon Johnson pointed out that there existed no agency in the executive branch with the responsibility to help coordinate and recommend telecommunications policy for the President. The Office of Telecommunications, like the agencies that had preceded it, dealt primarily with the governmental side of the telecommunications industry. There was no agency in the executive branch to work alongside the FCC to promulgate the rules and regulations affecting private broadcasting. President Johnson wished to create such an agency. He requested the Bureau of the Budget, and a special communications task force he appointed, to make reports "of existing governmental organization in the field of communications and to propose needed modifications."[38]

The Bureau of the Budget's report, released in December of 1968, recommended that a "new and strengthened central policy and long range planning organization for telecommunications . . . be established in the executive branch."[39] The nucleus for this agency would be the Office of Telecommunications Management. The President's Task Force on Communications also released its report in December of 1968, recommending that:

> the Executive Branch . . . have a strengthened capability to address the broad range of policy questions of concern to the Executive. It should have adequate technical and financial resources to make appropriate long range studies; to give useful advice on specific issues to the FCC, to state governments, to various Executive Branch agencies, and to private groups and industries; to explore new applications of telecommunications; and above all to coordinate Executive roles in telecommunications leading to development of coherent and forward looking policies guiding Executive action.[40]

President Richard Nixon authorized the continuation of the Task Force's recommendations after a study by advisor Clay Whitehead. Whitehead's report was released in December of 1969 and the Office of Telecommunications Policy was established according to the guidelines it contained.

Office of Telecommunications Policy Established

There are a number of reasons for examining closely the Office of Telecommunications Policy. It is the central agency in the executive branch with responsibility for formulating telecommunications policies for the President. It is the agency that attempted to rival the FCC in communications regulation. And it not only established its own policy guidelines concerning the fairness doctrine and license renewal procedures, but attempted to get legislation through Congress implementing these policy recommendations. Furthermore, an understanding of this agency is necessary to an understanding of the relationship between the Nixon Administration and the press.

On February 9, 1970, President Richard Nixon announced that he was establishing a new office in the executive branch, the Office of Telecommunications Policy. Through Reorganization Plan No. 1, the new agency would consist of a director, a deputy director and an administrative staff. Both the director and deputy director would be appointed by the President with the advice and consent of the Senate. The Office of Telecommunications Management would be abolished and its functions transferred to the OTP. The President said he would assign additional duties to the director after the reorganization plan went into effect.

The President said the OTP would:

1. serve as the president's principal advisor on telecommunications policy and help formulate governmental policies and programs concerning both domestic and international telecommunications issues;
2. help formulate policies and help coordinate telecommunications operations for the federal government.[41]

These two functions were essentially the same as those assigned to all the previous telecommunications agencies in the executive branch. But the OTP would have one additional function:

> Finally, the new office would enable the executive branch to speak with a clearer voice and to act as a more effective partner in discussions of communications policy with both the Congress and the Federal Communications Commission. This action would take away none of the prerogatives or functions assigned to the Federal Communications Commission by the Congress. It is my hope, however, that the new Office and the Federal Communications Commission would cooperate in achieving certain reforms in telecommunications policy, especially in their procedures for allocating positions of the radio spectrum for government and civilian use.[42]

Thus, the President made it clear that he wanted the OTP to take an active role in "procedures for allocating positions of the radio spectrum." In other words, the President said the OTP would take a role in the license granting procedures established by the FCC.

While Congress as a whole did not disapprove of the President's reorganization plan, one congressman did; Cornelius Gallagher (D—N.J.) voiced his objection in a House resolution. During House subcommittee hearings on Reorganization Plan No. 1 and his resolution (HR 841) Gallagher said:

> My concern, and the basis of my disapproval is simply that we cannot talk of increasing the efficiency and economy of Federal communications without, at the same time, focusing on the issue of computer privacy and the integrity of the data flow along communications lines.[43]

Gallagher thought the OTP *would* be able to deal directly with the complex problems of cable television, satellite use, spectrum allocation, and other communications matters. But he wanted the plan disapproved "unless the issue of computer privacy [would become] a part of the new Office of Telecommunications Policy."[44]

The House subcommittee recommended to the Committee on Government Operations that Reorganization Plan No. 1 be received favorably. The committee accepted the recommendation and the OTP went into effect April 20, 1970. A vote was not taken in either house against the plan.

The man nominated as director of the new office was Clay T. Whitehead—the presidential advisor whose report had recommended establishment of such an office. During Whitehead's confirmation hearings and the first few months of the OTP's existence, questions were raised concerning the relationship between the OTP and the FCC. President Nixon had said in his reorganization speech that the new office would work *with* the FCC and not take away any of its functions or prerogatives. The OTP would make studies and report its findings to the FCC.

Chairman of the FCC Dean Burch said he had "absolutely no fear of either actual or possible undue influence by the White House on the Commission by virtue of this office."[45] He said "the Commission does not intend to relinquish any of its powers because of this new office. We intend to make our own judgments based on our own concept of what is in the public interest."[46]

White House press secretary Ron Zeigler said that the FCC "will remain independent" and will "not be bound" by the views expressed by the OTP.[47] And FCC Commissioner Kenneth Cox described Reorganization Plan No. 1 as "harmless."[48] He said the FCC could accept or reject any views expressed by the OTP.

But others felt the OTP would play more than an advisory role. The New York *Times* reported (2-10-70):

> The recommendation of an executive office for communications constitutes formal recognition that the F.C.C., often preoccupied with quasi-judicial proceedings, has lacked the staff and, according to some, the inclination to chart innovative policy at a time of dramatic change and challenge in communications.

Whitehead was among those who felt the FCC was not coping adequately with the problems confronting the communications industry. Whitehead's position is clear in an exchange with the chairman of a Senate subcommittee on appropriations:

> Mr. Steed: I get the feeling as I listen to you that some of the problems we have stem from what appears to be either economics or failure on the part of the Federal Communications Commission to move in and make determinations. Is this because they are lacking authority or lacking in policy direction which would justify their moving?
>
> Has the state of the art gone beyond the enabling legislation that set up the FCC and outlined its rights and powers? Is that one of the problems we have?
>
> Mr. Whitehead: I think that is one of the problems. The major enabling legislation for the FCC is extremely bad and, as a result, the Commission finds little guidance from the Congress on many policy issues that were not even foreseen at the time the 1934 Communications Act was passed.
>
> Mr. Steed: Do you contemplate, among other things, that you may be able to devise suggested legislation that would firm this up, modernize it, make it more effective for a commission to deal with recurring problems?
>
> Mr. Whitehead: Yes, sir; that is one of the things we are actually looking at.[49]

Broadcasting reported:

> Dr. Whitehead also made it clear that if the commission did exercise its option to reject a proposal advanced by OTP—and OTP felt strongly enough about the matter—it would not simply go away. OTP might go to Congress or, conceivably the courts in attempts to reverse the commission.[50]

The same *Broadcasting* article quoted Whitehead as saying: "The weight of the President can be presumed to be behind everything OTP does." Statements such as this were a factor in the problems the OTP had later with the press and Congress.

The Office of Telecommunications Policy has helped

coordinate the federal government's use of communications systems and services; it has established a policy whereby the OTP relies on private industry for communications system designs, engineering, operation and maintenance; it has drafted legislation affecting the cable television industry, as well as helping to develop cable as a viable communications medium; it has drafted legislation providing long-range federal funding for the Corporation for Public Broadcasting; and it has had an interest in international communications and a global satellite system for providing communications to civilian ships at sea. But no activity has caused as much controversy as the OTP's interest in license renewal and the fairness doctrine.

Whitehead Takes a Stand

Whitehead's first major statement on license renewal and the fairness doctrine came in a speech to the International Radio and Television Society in 1971. Whitehead said it was time to redefine "the relationships in the Communication Act's triangle of government, private industry, and the public."[51] He advanced three proposals which he said would help redefine these relationships:

> One, eliminate the Fairness Doctrine and replace it with a statutory right of access; two, change the license renewal process to get government out of programming; and three, recognize commercial radio as a medium that is completely different from TV and begin to de-regulate it.[52]

Whitehead said he would replace the fairness doctrine with a system of paid access similar to that used in magazines (i.e., a person purchases space for his message). Television time would be bought without rate regulation by the federal government, on a first-come-first-served basis.

Whitehead also said he would do away with the formula or quota system currently used by the FCC in license renewal determinations. He advocated a renewal process whereby the licensee would be judged on whether he had made a good-faith effort to discern the needs of his community and a good-faith effort to fulfill those needs. Whitehead also favored extending the license period. He said these proposals were his own, but reflected the "broad thinking of the administration."[53]

Reaction to the speech was mild. Most broadcasters wanted a more detailed presentation of Whitehead's ideas before they would comment. One NBC spokesman did say that he thought the proposals were "bold, innovative and like a breath of fresh air," and that broadcasters "would support most of them, although they include some points that need further study and clarification."[54]

On January 1, 1973, *Broadcasting* reported that, "For most of his two years as the first director of the Office of Telecommunications Policy, Clay T. Whitehead's visibility ranged from moderate to zero."[55] But that all changed December 18, 1972. On that date Whitehead made a speech to the Indianapolis chapter of Sigma Delta Chi in which he severely criticized network news and made bold proposals advocating changes in the license renewal process and the fairness doctrine. This speech expanded the ideas in his 1971 license renewal/fairness doctrine speech.

Whitehead began by saying that local broadcasters could "no longer accept network standards of taste, violence, and decency in programming."[56] He recommended:

> If the programs or commercials glorify the use of drugs; if the programs are violent or sadistic; if commercials are false or misleading, or simply intrusive and obnoxious; the stations must jump on the networks rather than wince as the Congress and the FCC are forced to do.[57]

Whitehead referred to the fact that the major broadcasting networks are beyond the direct control of the federal government in communications matters. The networks are private corporations and therefore not subject to FCC regulations. Each major network is permitted to own and operate no more than five television stations. The FCC has only nominal authority over these stations. Since the federal government could not directly regulate the networks, Whitehead advocated that the local affiliates be responsible for the network programming on their channels.

Whitehead went on to say that "station owners and managers cannot abdicate responsibility for news judgment. . . . [They] have final responsibility for news balance —whether the information comes from their own newsroom or from a distant network."[58] And he warned, "Station managers and network officials who fail to act to correct imbalance or consistent bias from the networks— or who acquiesce by silence—can only be considered willing participants, to be held fully accountable by the broadcaster's community at license renewal time."[59]

Whitehead still advocated elimination of the fairness doctrine. He said "the First Amendment is meaningless if it does not apply fully to broadcasting."[60] He also called for longer license periods and a restructuring of the license renewal process. He said the OTP was preparing legislation for Congress that would bring about these changes.

According to *Broadcasting* magazine, reactions to Whitehead's speech were on the whole unfavorable.[61] Sen. Vance Hartke (D-Ind.) and Rep. Jerome Waldie (D-Calif.) regarded the speech as an effort to have the networks produce news to suit the Nixon Administration. NBC News President Reuven Frank called the speech a "threat" to network broadcasting. And FCC Commissioner Nicholas Johnson said, "It appears that young Clay Whitehead is to provide us with 'four more years' of Nixon's war on the networks. . . . ."

For the next few months, Whitehead attempted to explain the purpose of his Indianapolis speech. He said the speech "was intended to remind licensees of their responsibilities to correct faults in the broadcasting system that are not (and should not) be reachable by the regulatory process of government."[62]

OTP Legislation Before Congress

On March 13, 1973, Rep. Harley Staggers (D-W.Va.) introduced the OTP legislation in the House.[63] The bill's first provision extended the period of a license from three years to five years, which Whitehead felt would reduce the opportunity for governmental interference in broadcasting.

The second provision eliminated the FCC's requirement of a hearing for every application for the same broadcasting service. Under the OTP bill, there would be one comparative hearing in which all parties interested in

the action would participate. Whitehead felt that numerous hearings not only lengthened the renewal process but also were very costly.

The third provision prohibited the FCC from restructuring the broadcasting industry through the license renewal process. Any major changes needed in the industry could be made only by specific FCC rulings.

The fourth, and perhaps most important provision, prohibited the FCC from using, as it now does, predetermined categories, formats, quotas, or guidelines for evaluating the programming performance of license renewal applicants. Although the 1934 Communications Act provides that a license may be granted or renewed if the public interest, convenience, or necessity would be served, it does not indicate how this requirement can be met. Whitehead felt that the FCC should decide from a community standpoint whether the public interest would be served by a broadcaster, rather than trying to define at the national level what the public interest should be. And Whitehead said, "If a station can't demonstrate meaningful service to all elements of his community, the license should be taken away by the FCC."[64]

While Whitehead advocated abolishing the fairness doctrine, the OTP bill did not specifically deal with the fairness doctrine requirement. Technically, the fairness doctrine is not a criterion in the license renewal process. Issues involving the doctrine are usually handled separately, on a case-by-case basis. However, under the OTP bill, the fairness doctrine (or, as Whitehead liked to call it, the "fairness obligation") would be included in the renewal process determination. Whitehead felt the fairness doctrine should not be a requirement on broadcasters rather, it should be "obligatory." The license renewal process would be structured differently under the OTP bill. As Whitehead explained it:

> One, the broadcaster must be substantially attuned to community needs and interests, and respond to those needs and interests in his programming—this is known as the ascertainment obligation; and two, the broadcaster must provide reasonable opportunity for discussion of conflicting views on public issues—this is known as the fairness obligation.[65]

As Whitehead said, those who failed to meet these two requirements faced losing their licenses. However, he gave no indication of how a broadcaster could determine all the needs of his community.

Reaction to the OTP bill was unfavorable. Major newspapers (many owning television stations), news magazines, and columnists were critical. Tom Wicker of the New York *Times* said (12-21-72) the "American people will be the losers if the managers of the local stations that run network news are to be made so nervous that they harass the networks to be less controversial. . . ." The Washington *Post* said (12-22-72) the bill was "the administration's hostility to free and vigorous journalism particularly as practiced by the networks." The *Christian Science Monitor* said (12-22-72) "the legislation which the White House proposes would convert American television into what the French had during the deGaulle era—a vehicle for the views of government which would never be questioned or doubted—an official, government-controlled channel for government propaganda." The Los Angeles *Times* said (12-24-72) the legislation "may be nothing more than a mask for an effort to intimidate network news and programming."

However, John Schneider, President of CBS/Broadcast Group said that the bill would "appear to be very much in the public interest as well as that of broadcast licensees."[66]

Whitehead's reaction to all of this? "The whole goddam press corps rose up in arms against a bill that any broadcaster or newspaper that owns a TV station would think is a damn good bill."[67]

The House Subcommittee on Communications and Power held extensive hearings during the summer of 1973 on twelve license renewal bills, including the OTP bill. It was apparent that the time had come for major license renewal legislation.

On February 27, 1974, the subcommittee sent to the Committee on Interstate and Foreign Commerce its version of a license renewal bill—HR 12993—and on March 6 the committee reported favorably on it. The bill was sent to the House and on May 1 passed 379-14. The OTP bill was dead in the House, but there was still a chance of getting it passed through the Senate when the House bill was considered.

Whitehead had introduced the OTP bill in the Senate early in 1973, as a precaution against its defeat in the House. He defended the OTP bill at hearings held by the Senate Commerce Committee's subcommittee on communications, but, unlike the House subcommittee hearings, he was questioned very little. Not unexpectedly, the subcommittee reported favorably on HR 12993 and the Senate Commerce Committee unanimously supported it. That bill passed the Senate October 8, 1974, and was referred to a joint conference committee. The OTP bill was officially dead.

Why the OTP Bill Died

One factor that perhaps helped contribute to the bill's demise was the relationship between the OTP, the White House and Congress. First of all, the OTP was on shaky ground with Congress. Both houses were competing with each other to make large budget cuts in OTP's relatively small budget. Then, Sen. John Pastore (D-R.I.) said he was dismayed by the OTP's failure to develop an over-all national policy on telecommunications.[68] Pastore felt such a national policy was essential and considered that the main reason for establishing the OTP in the first place. However, Whitehead reminded him that, during his confirmation hearings, he had said that it would be difficult to establish such a national policy. But this did not improve relations between Whitehead and Pastore.

Whitehead also had problems in the House. He had received rough treatment during license renewal hearings, especially from House subcommittee chairman Torbert Macdonald (D-Mass.). Macdonald was an adversary of Whitehead and the OTP's license renewal bill. He felt that Whitehead's Indianapolis speech was an attempt by the Nixon Administration to control television programming.

At this time, Whitehead became aware that many in Congress had come to associate the Nixon Administration's attitudes on the press with those of the OTP. These congressmen remembered that after the OTP was established Whitehead had said that everything the agency did had the authority of the President behind it. He had said his 1971 license renewal/fairness doctrine speech was

based on the broad thinking of the White House. And during the House subcommittee's license renewal hearings, Whitehead said, "I am speaking for the administration on these matters."[69] On still another occasion, Whitehead said: "My job is to take the positions and say the things that the President wants me to, and to espouse my views after studying the issues."[70]

Because of this confusion as to whose attitudes the OTP actually represented, Whitehead suggested that the agency be taken out of the executive branch and made nto an independent agency, something like NASA. Nothing, however, came of this suggestion.

The OTP was viewed with disfavor by congressmen other than Pastore and Macdonald. Sen. Lowell Weicker (R-Conn.) felt the OTP should be abolished and its functions transferred to the FCC. Weicker called the agency "a danger to the freedom of the press which is guaranteed in the First Amendment."[71] Weicker and Sen. Abraham Ribicoff (D-Conn.) introduced legislation on November 9, 1973 to have the OTP abolished. The bill was reported to the Committee on Government Operations, but had little effect in the Senate. Faced with the energy crisis, Watergate, and a host of other problems, Congress was too occupied to consider the Weicker-Ribicoff bill. As far as can be determined, it was never reported out of committee and no hearings were held.

On October 8, 1974, Whitehead resigned (N.Y. *Times*, 8-9-74), the same day President Nixon announced he was resigning. Deputy Director John Eger became temporary head of the OTP.

Future Unknown

The Office of Telecommunications still exists, although it was almost abolished again in 1975. Early that year, President Gerald Ford wanted to reorganize the executive office. The reorganization would abolish the OTP and transfer its functions to the Department of Commerce. The OTP was still experiencing budget problems with Congress. It was felt that abolishing OTP would not only help to reorganize the executive office, but would also help the executive office in its relations with Congress. However, a few weeks after this reorganization plan became known, White House sources stated (N.Y. *Times*, 1-18-75) that the OTP would not be abolished. According to the sources, the President changed his mind partly because of congressional pressure. Sen. Howard Baker (R-Tenn.) felt that Congress had approved the formation of the OTP in 1970 (at least, they didn't disapprove it), and that Congress should have an opportunity to be heard if abolishing the agency was being considered.

In June, 1975, the White House said the OTP would play a diminished role in policy-making, at least as far as radio and television were concerned.[72] The agency's main function would be concentrated on management of the governmental side of the broadcasting industry. This decision returned the agency to the same functions held by all the previous agencies in the executive branch.

In 1976, the OTP maintained a low profile in the telecommunications policy area. Its functions were those that the White House said it would have. It still did not have a permanent director. Perhaps under a new president, and with a permanent director, the OTP can smooth its relations with Congress and become effective as an agency in the executive branch concerned with telecommunications policy formulation for the private sector.

FOOTNOTES

1. *Palko v. Connecticut*, 302 U.S. 319 at 327 (1937).
2. Blackstone's *Commentaries*, 4:151-52.
3. *Ibid.*
4. *Schenck v. United States*, 249 U.S. 47 at 52 (1919).
5. *Gitlow v. New York*, 268 U.S. 652 at 666 (1925).
6. "Broadcasting Not on Equal Footing with Print Media: Burger," *Broadcasting*, Oct. 6, 1975, p. 50.
7. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).
8. *Columbia Broadcasting System v. Democratic National Committee*, 412 U.S. 94 (1973).
9. 418 U.S. 241 at 258.
10. *United States v. Paramount Pictures*, 334 U.S. 131 (1948) at 166.
11. *Superior Films v. Department of Education of Ohio*, 346 U.S. 587 (1954) at 589.
12. *Farmers Educational and Cooperative Union of America v. WDAY, Inc.*, 360 U.S. 525 (1959) at 529-30.
13. *Red Lion Broadcasting Co. v. Federal Communications Commission*, 395 U.S. 367 (1969) at 388.
14. 395 U.S. 367 at 386.
15. 412 U.S. 94 at 125.
16. 412 U.S. 94 at 154, 159-60.
17. A recent book dealing with this topic in more detail is Fred W. Friendly's *The Good Guys, The Bad Guys and the First Amendment: Free Speech vs. Fairness in Broadcasting* (New York: Random House, 1975-1976).
18. Walter B. Emery, *Broadcasting and Government: Responsibilities and Regulations* (East Lansing: Michigan State University Press, 1961), p. 17.
19. Sydney Head, *Broadcasting in America: A Survey of Television and Radio*, 2d ed. (New York: Houghton Mifflin, 1972), p. 156.
20. House Report No. 1416, Jan. 16, 1923.
21. *Ibid.*
22. *Hoover, Secretary of Commerce v. Intercity Radio Co.*, 286 Fed. Rpt. 1003 at 1007 (1923).
23. Emery, p. 18.
24. Head, p. 159.
25. Emery, p. 17.
26. See *United States v. Zenith Radio Corporation*, 12 F.2d 614 (1926); 29 Attorney General Opinions 579 (1912); and 35 Attorney General Opinions 126 (1926).
27. 44 Stat. 1162 (1927).
28. *Ibid.*
29. *Ibid.*
30. 78 *Congressional Record* 3181, Feb. 26, 1934.
31. Emery, p. 23.
32. It is not the purpose of this paper to trace the development of the fairness doctrine or the FCC's license renewal process. See Frank J. Kahn, ed., *Documents of American Broadcasting* (New York: Appleton-Century-Crofts, 1968). Also see *Freedom of Information Bulletins* 206, 251, 253, 278 and 323 (published by Freedom of Information Center, University of Missouri School of Journalism, Columbia, Missouri 65201).
33. 16 Fed. Reg. 12452 (1950). This procedure has been changed over the years by various executive orders. The point here is that the authority no longer belonged to the President.
34. 16 Fed. Reg. 10329 (1951). This discussion of the evolution of the various telecommunications agencies in the executive branch is extremely simplified. Numerous other duties and functions that belonged to these agencies are not pertinent to this paper.
35. *United States Government Organization Manual: 1952-53* (Washington: Government Printing Office, 1952), p. 59. (Referred to hereafter as *Government Manual*.)
36. *Government Manual: 1953-54*, p. 68.
37. *Government Manual: 1974-75*, p. 142.
38. *Public Papers of the Presidents: Lyndon B. Johnson*, Book II (Washington: Government Printing Office, 1968), p. 763.
39. U.S. Congress, House, Committee on Government Operations, Subcommittee on Executive and Legislative Reorganization, *Reorganization Plan No. 1 of 1970 (Office of Telecommunications Policy)*, Hearings, 91st Congress, 2d Session, March 9-10, 1970, p. 79.
40. "Final Report," *President's Task Force on Communications Policy*, December 7, 1968 (Washington: Government Printing Office, 1968), pp. 25-26.
41. Executive Order 11556 (35 Fed. Reg. 14193), 1970.
42. *Ibid.*
43. House subcommittee hearings on Reorganization Plan No. 1 of 1970, p. 66.
44. *Ibid.*, p. 67.
45. *Ibid.*, p. 51.
46. *Ibid.*, p. 61.
47. "White House Plans New Policy Office," *Broadcasting*, Feb. 16, 1970, p. 36.
48. *Ibid.*, p. 38.
49. U.S. Congress, House, Committee on Appropriations, Subcommittee on Treasury, Post Office, and General Government Appropriations, *Appropriations—Fiscal Year 1972*, Hearings, 92nd Congress, 1st Session, Pt. 4, pp. 187-88.
50. "A Hot New Breath Down FCC's Neck," *Broadcasting*, Sept. 28, 1970, p. 24.
51. U.S. Congress, House, Committee on Interstate and Foreign Commerce, Subcommittee on Communications and Power, *Broadcast License Renewal*, Hearings, 93rd Congress, 1st Session, Parts 1 and 2, p. 861.
52. *Ibid.*, p. 863.
53. "Whitehead Calls for a New Deal," *Broadcasting*, Oct. 11, 1971, p. 14.

54. *Ibid.*
55. "The Dust Hasn't Settled After Speech by Whitehead," *Broadcasting*, Jan. 1, 1973, p. 18.
56. *Broadcast License Renewal*, p. 866.
57. *Ibid.*
58. *Ibid.*
59. *Ibid.*, p. 867.
60. *Ibid.*, p. 865.
61. "The Dust Hasn't Settled," p. 18.
62. "Whitehead: Try the Renewal Bill, You'll Like It," *Broadcasting*, Feb. 5, 1973, p. 30.
63. H.R. 5546, *Broadcast License Renewal*, pp. 1-5.
64. *Broadcast License Renewal*, p. 866.
65. *Broadcast License Renewal*, p. 795.
66. "Macdonald Takes a Poke at OTP, Urges Broadcasters to Fight for Rights," *Broadcasting*, Jan. 22, 1973, p. 23.
67. "A Beleaguered Whitehead and Battered OTP," *Broadcasting*, Sept. 17, 1973, p. 16.
68. *Ibid.*
69. *Broadcast License Renewal*, p. 813.
70. "A Beleaguered Whitehead," p. 16.
71. "Weicker Sets Out to Abolish OTP, Calls it Threat to Press Freedom," *Broadcasting*, Nov. 12, 1973, p. 7.
72. "Lower Profile," in "Closed Circuit" section, *Broadcasting*, June 23, 1975, p. 19.

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